Public Prosecutor v Dato' Seri Anwar bin Ibrahim

HIGH COURT (KUALA LUMPUR) — CRIMINAL TRIAL NO 45–47 OF 1998, 45–48 OF 1998, 45–49 OF 1998, 45–50 OF 1998, 45–51 OF 1998, 45–52 OF 1998, 45–53 OF 1998 AND 45–54 OF 1998
AUGUSTINE PAUL J
21 OCTOBER 1998

Criminal Procedure *— Bail — Granting of — Principles governing bail — Circumstances when High Court should grant bail — Principles governing imposition of conditions of bail — Criminal Procedure Code (FMS Cap 6) ss 387, 388 & 389*

The accused — the former Deputy Prime Minister and Minister of Finance, Malaysia — was charged with five counts of sodomy under s 377B of the Penal Code (FMS Cap 45) and five counts of corrupt practices under s 2(1) of the Emergency (Essential Powers) Ordinance (No 22 of 1970) ('the Ordinance'). The accused claimed trial to all the charges. The defence made an oral application for the accused to be released on bail in respect of all the ten charges. At the time of the application, the accused was also detained under the Internal Security Act 1960 ('the ISA'). A number of grounds were advanced by the defence in support of its application.

Held, dismissing the application:

(1) There is no mandatory requirement in s 388 of the Criminal Procedure Code (FMS Cap 6) ('the CPC') that an application for bail must be made in writing. The court can consider the prayer for bail even if made by the accused or his counsel orally (see p 492B); *Babu Singh v State of UP* 1978 Cr LJ 657 and *Nabachandra Singh v Manipur Administration* AIR 1964 Mani 39 followed.

(2) The offences of sodomy are non-bailable as shown in the First Schedule to the CPC. Therefore, bail is at the discretion of the court. With regard to the offences for corrupt practices under s 2(1) of the Ordinance, a specific provision for bail is provided for offences under the Ordinance by virtue of s 9(1) of the Ordinance. Therefore, bail in the case of offences under the Ordinance is at the discretion of the court and is not a matter of right (see p 492D–H).

(3) The detention under the ISA and the bail application were separate and distinct issues. The granting of bail to the accused in the face of his detention under the ISA was not an exercise in futility. The application for bail by the accused could be considered on its own merits notwithstanding the fact that he was subject to detention in respect of another matter (see pp 492I and 493A–C); *Madike v The State* (1992) LRC (Crim) 144 followed.

(4) The social position or status of an accused person per se is not a sufficient ground for granting or rejecting an application for bail;

Shaikh Karim & Ors v Emperor AIR 1926 Nag 279 and *State v Mehboob Ali Khan* AIR 1956 Bom 548 followed. The character, behaviour, means and standing of the accused may assume relevance along with other circumstances in considering whether to release the accused on bail; *Juglekor v Emperor* ILR 54 All 115 and *Raja Narendralal Khan v Emperor* ILR 36 Cal 166 followed. The gravity of the offence is also to be considered in granting or refusing bail even if the social position or status of the accused is very high in society. In the circumstances, the social status of the accused did not operate in his favour as the other grounds advanced by him had no merit (see p 493H–I).

(5) Bail on medical grounds should not be granted by the court unless it is satisfied that the illness is such as would not be properly treated while the accused is under detention. Where proper treatment is available in the place of detention, bail cannot be granted in respect of the illness. On the facts, no material was placed before the court to show that the accused would not get appropriate medical treatment while in detention (see p 494B–D); *Sangappa v State of Karnataka* 1984 Cr LJ 1367 followed.

(6) The fact that there is no danger of the accused absconding or leaving the jurisdiction is an important factor to be considered in favour of the accused when assessing an application for bail. This factor must however be considered in the light of the other features of the case (see p 494F–G); *Gurbaksh Singh v State of Punjab* AIR 1980 SC 1632 followed.

(7) There is an onus on the accused to show, on a balance of probabilities, that his admission to bail will not prejudice the interests of justice (see p 494H); *Hussey v The State* (1992) LRC (Crim) 62 followed. An allegation of tampering with witnesses is a matter of serious concern in bail applications. The likelihood of witnesses being tampered with is a cogent reason for the accused not to be released on bail (see p 495B, H); *PP v Wee Swee Siang* [1948] MLJ 114 followed.

(8) The submission that bail may be granted with conditions attached will only arise for consideration, if in the first place, the court is amenable to grant bail. Conditions attached to bail are complementary and concomitant to the grant of bail (see p 496B–C); *PP v Dato' Mat* [1991] 2 MLJ 186 followed.

[Bahasa Malaysia summary

Tertuduh — bekas Timbalan Perdana Menteri dan Menteri Kewangan Malaysia — telah dituduh dengan lima tuduhan meliwat di bawah s 377B Kanun Keseksaan (NMB Bab 45) dan lima tuduhan perbuatan rasuah di bawah s 2(1) Ordinan Darurat (Kuasa-Kuasa Perlu) (No 22 tahun 1970) ('Ordinan tersebut'). Tertuduh telah menuntut perbicaraan terhadap kesemua pertuduhan tersebut. Pihak pembelaan

telah membuat satu permohonan lisan supaya tertuduh dilepaskan atas jaminan berhubung dengan sepuluh pertuduhan tersebut. Pada waktu permohonan tersebut, tertuduh telah juga ditahan di bawah Akta Keselamatan Dalam Negeri 1960 ('AKDN'). Beberapa alasan telah dikemukakan oleh pihak pembelaan bagi menyokong permohonannya.

Diputuskan, menolak permohonan:

(1) Tidak terdapat keperluan mandatori dalam s 388 Kanun Acara Jenayah (NMB Bab 6) ('KAJ') bahawa sesuatu permohonan untuk jaminan mestilah dibuat secara bertulis. Mahkamah boleh mempertimbangkan permohonan untuk jaminan walaupun dibuat secara lisan oleh tertuduh atau peguamnya (lihat ms 492B); *Babu Singh v State of UP* 1978 Cr LJ 657 dan *Nabachandra Singh v Manipur Administration* AIR 1964 Mani 39 diikut.

(2) Kesalahan meliwat tidak boleh dijamin sepertimana yang ditunjukkan dalam Jadual Pertama KAJ. Dengan itu, jaminan adalah atas budi bicara mahkamah. Berhubung kesalahan perbuatan rasuah di bawah s 2(1) Ordinan tersebut, peruntukan spesifik untuk jaminan diperuntukkan untuk kesalahan-kesalahan di bawah Ordinan tersebut menurut s 9(1) Ordinan tersebut. Dengan itu, jaminan dalam kes kesalahan-kesalahan di bawah Ordinan tersebut adalah atas budi bicara mahkamah dan bukan suatu perkara yang mengikut hak (lihat ms 492D–H).

(3) Penahanan di bawah AKDN dan permohonan jaminan adalah isu-isu yang berasingan dan berbeza. Pemberian jaminan kepada tertuduh ketika dalam tahanan di bawah AKDN bukannya merupakan suatu perlaksanaan yang sia-sia. Permohonan untuk jaminan oleh tertuduh boleh dipertimbangkan atas meritnya sendiri meskipun terdapat fakta bahawa beliau tertakluk kepada penahanan berhubung dengan suatu perkara yang lain (lihat ms 492I dan 493A–C); *Madike v The State* (1992) LRC (Crim) 144 diikut.

(4) Status atau kedudukan sosial seseorang tertuduh per se bukannya alasan yang memadai untuk memberikan atau menolak sesuatu permohonan untuk jaminan; *Shaikh Karim & Ors v Emperor* AIR 1926 Nag 279 dan *State v Mehboob Ali Khan* AIR 1956 Bom 548 diikut. Keperibadian, kelakuan, cara dan kedudukan tertuduh boleh memberikan perkaitan bersama-sama dengan keadaan-keadaan yang lain dalam mempertimbangkan sama ada untuk melepaskan tertuduh atas jaminan; *Juglekor v Emperor* ILR 54 All 115 dan *Raja Narendralal Khan v Emperor* ILR 36 Cal 166 diikut. Keseriusan kesalahan harus juga dipertimbangkan dalam memberikan atau menolak jaminan walau sekalipun status dan kedudukan sosial tertuduh amat tinggi di kalangan masyarakat. Dalam keadaan demikian, status sosial tertuduh tidak memihak kepadanya kerana alasan-alasan lain yang dikemukakan oleh beliau tidak mempunyai merit (lihat ms 493H–I).

(5) Jaminan atas alasan kesihatan tidak seharusnya diberikan oleh mahkamah kecuali mahkamah berpuas hati bahawa penyakit yang sedemikian rupa tidak akan mendapat rawatan yang sewajarnya ketika tertuduh berada dalam tahanan. Di mana rawatan wajar terdapat di tempat penahanan, jaminan tidak boleh diberikan berhubung dengan penyakit. Berdasarkan fakta-fakta tersebut, tiada bahan telah dikemukakan di hadapan mahkamah bagi menunjukkan bahawa tertuduh tidak akan mendapat rawatan perubatan yang sewajarnya ketika dalam tahanan (lihat ms 494B–D); *Sangappa v State of Karnataka* 1984 Cr LJ 1367 diikut.

(6) Hakikat bahawa tiada keadaan yang membahayakan bahawa tertuduh akan melarikan diri atau meninggalkan bidang kuasa merupakan faktor yang penting untuk dipertimbangkan yang memihak kepada tertuduh ketika menilai sesuatu permohonan untuk jaminan. Faktor ini namun begitu semestinya dipertimbangkan memandangkan ciri-ciri lain kes tersebut (lihat ms 494F–G); *Gurbaksh Singh v State of Punjab* AIR 1980 SC 1632 diikut.

(7) Terdapat beban ke atas tertuduh untuk menunjukkan, atas imbangan kebarangkalian, bahawa kemasukan jaminan beliau tidak akan memudaratkan kepentingan keadilan (lihat ms 494H); *Hussey v The State* (1992) LRC (Crim) 62 diikut. Sesuatu pengataan mengganggu saksi-saksi merupakan suatu perkara yang serius dalam permohonan-permohonan jaminan. Kemungkinan saksi-saksi diganggu merupakan alasan yang meyakinkan bagi tertuduh tidak dilepaskan atas jaminan (lihat ms 495B, H); *PP v Wee Swee Siang* [1948] MLJ 114 diikut.

(8) Penghujahan bahawa jaminan boleh diberikan secara bersyarat akan hanya berbangkit untuk pertimbangan, jika pada asalnya, mahkamah boleh memberikan jaminan. Syarat-syarat yang terdapat pada jaminan adalah saling melengkapi dan mengiringi pemberian jaminan (lihat ms 496B–C); *PP v Dato' Mat* [1991] 2 MLJ 186 diikut.]

Notes

For cases on granting of bail, see 5 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 544–558.

Legislation referred to

Criminal Procedure Code (FMS Cap 6) ss 2, 319, 387, 388, 389
Emergency (Essential Powers) Ordinance (No 22 of 1970) ss 2(1), 9(1)
Internal Security Act 1960
Penal Code (FMS Cap 45) s 377B

Cases referred to

Babu Singh v State of UP [1978] Cr LJ 657; AIR 1978 SC 527 (folld)
Bakshi Sardari Lal v Supt, Tehar Central Jail [1968] Cr LJ 675 (refd)
Che Su bte Daud v PP [1978] 2 MLJ 162 (refd)
Chinnakarappan v PP [1962] MLJ 234 (refd)
Gurbaksh Singh v State of Punjab AIR 1980 SC 1632 (folld)
Hussey v The State (1992) LRC (Crim) 62 (folld)
Juglekor v Emperor ILR 54 All 115 (folld)
KS Menon, Re [1949] MLJ 49 (refd)
Lim Kiap Khee v PP [1988] 1 MLJ 198 (refd)
Loy Chin Hei v PP [1982] 1 MLJ 31 (refd)
Madike v The State [1992] LRC (Crim) 144 (folld)
Nabachandra Singh v Manipur Administration AIR 1964 Mani 39 (folld)
PP v Dato' Mat [1991] 2 MLJ 186 (folld)
PP v Latchemy [1967] MLJ 79 (refd)
PP v Mat Zain [1948–49] MLJ Supp 142 (refd)
PP v Wee Swee Siang [1948] MLJ 114 (folld)
PP v Zulkifflee bin Hassan [1990] 2 MLJ 215 (refd)
R v Chan Choon Weng & Ors [1956] MLJ 81 (refd)
R v Lim Kwang Seng & Ors [1956] MLJ 178 (refd)
R v Ooi Ah Kow [1952] MLJ 95 (refd)
Raja Narendralal Khan v Emperor ILR 36 Cal 166 (folld)
Ratilall Bhanji Mithani v Assistant Collector of Customs AIR 1967 SC 1939 (refd)
Sagri Bhagat & Ors v State of Bihar AIR 1951 Pat 497 (refd)
Sangappa v State of Karnataka [1984] Cr LJ 1367 (folld)
Sebastian v PP [1968] 2 MLJ 214 (refd)
Shahzad Hossain Khan v Ishtaq Hasam Khan AIR 1987 (refd)
Shaikh Karim & Ors v Emperor AIR 1926 Nag 279 (folld)
State v Jaspal Singh Gill AIR 1984 SC 1503 (refd)
State v Mehboob Ali Khan AIR 1956 Bom 548 (folld)
State v P Sugathan 1988 Cr LJ 1036 (refd)
Sulaiman bin Kadir v PP [1976] 2 MLJ 3 (refd)
Yusof bin Mohamed v PP [1995] 3 MLJ 66 (refd)

Abdul Gani Patail (*Azahar bin Mohamed, Mohd Yusof Zainal Abidin* and *Stanley Augustin* with him) (Attorney General's Chambers) for the prosecution.

Raja Aziz Addruse (*Sulaiman Abdullah, Christopher Fernando, Gurbachan Singh Pannu, Zainur Zakaria, Pawancheek Marican, Kamar Ainiah Kamaruzaman* and *Sankara N Nair* with him) (*Raja Aziz Addruse*) for the defence.

Augustine Paul J: Dato' Seri Anwar bin Ibrahim ('the accused'), the former Deputy Prime Minister and Minister of Finance, Malaysia, was produced before me on 5 October 1998, charged with five counts of sodomy under s 377B of the Penal Code and five counts of corrupt practices under s 2(1) of the Emergency (Essential Powers)

Ordinance (No 22 of 1970) ('Ordinance No 22'). The ten charges read as follows: A

First charge

Bahawa kamu, dari 12 Ogos 1997 hingga 18 Ogos 1997, di Kediaman Rasmi Timbalan Perdana Menteri, No 47, Jalan Damansara di dalam Wilayah Persekutuan Kuala Lumpur, semasa menjadi seorang anggota pentadbiran, iaitu, menjawat jawatan Timbalan Perdana Menteri dan Menteri Kewangan telah melakukan perbuatan rasuah di mana kamu telah: B

mengarahkan Dato' Mohd Said bin Awang, Pengarah Cawangan Khas dan Amir bin Junus, Timbalan Pengarah Cawangan Khas II Polis Di-Raja Malaysia, memperolehi pengakuan bertulis daripada Azizan bin Abu Bakar bagi menafikan salah laku seks dan liwat yang dilakukan oleh kamu dengan tujuan melindungi diri kamu daripada sebarang tindakan atau prosiding yang bersifat jenayah, dan akibatnya Azizan bin Abu Bakar telah memberi pengakuan bertulis bertarikh 18 Ogos 1997 kepada Perdana Menteri seperti yang diarahkan, C

dan oleh yang demikian kamu telah melakukan satu kesalahan yang boleh dihukum di bawah s 2(1) Ordinan Darurat (Kuasa-Kuasa Perlu) (No 22 tahun 1970). D

Second charge

Bahawa kamu, pada 27 Ogos 1997, di Kediaman Rasmi Timbalan Perdana Menteri, No 47, Jalan Damansara, di dalam Wilayah Persekutuan Kuala Lumpur, semasa menjadi seorang anggota pentadbiran, iaitu, menjawat jawatan Timbalan Perdana Menteri dan Menteri Kewangan telah melakukan perbuatan rasuah di mana kamu telah: E

mengarahkan Dato' Mohd Said bin Awang, Pengarah Cawangan Khas dan Amir bin Junus, Timbalan Pengarah Cawangan Khas II, Polis Di-Raja Malaysia menggesa Azizan bin Abu Bakar supaya memberi kenyataan umum bertulis bagi menafikan salah laku seks dan liwat yang dilakukan oleh kamu dengan tujuan melindungi diri kamu daripada sebarang tindakan atau prosiding yang bersifat jenayah dan akibatnya Azizan bin Abu Bakar telah memberikan kenyataan umum bertulis seperti mana yang diarahkan, F

dan oleh yang demikian kamu telah melakukan satu kesalahan yang boleh dihukum di bawah s 2(1) Ordinan Darurat (Kuasa-Kuasa Perlu) (No 22 tahun 1970). G

Third charge

Bahawa kamu pada 12 Ogos 1997 hingga 18 Ogos 1997, di Kediaman Rasmi Timbalan Perdana Menteri, No 47, Jalan Damansara, di dalam Wilayah Persekutuan Kuala Lumpur, semasa menjadi seorang anggota pentadbiran, iaitu, menjawat jawatan Timbalan Perdana Menteri dan Menteri Kewangan telah melakukan perbuatan rasuah di mana kamu telah: H

mengarahkan Dato' Mohd Said bin Awang, Pengarah Cawangan Khas dan Amir bin Junus, Timbalan Pengarah Cawangan Khas II Polis Di-Raja Malaysia, memperolehi pengakuan bertulis daripada Ummi Hafilda bte Ali bagi menafikan salah laku seks dan liwat yang dilakukan oleh kamu dengan tujuan melindungi diri kamu daripada sebarang tindakan atau prosiding bersifat jenayah dan akibatnya Ummi Hafilda bte Ali I

telah memberi pengakuan bertulis bertarikh 18 Ogos 1997 kepada Perdana Menteri sepertimana yang diarahkan,

dan oleh yang demikian kamu telah melakukan satu kesalahan yang boleh dihukum di bawah s 2(1) Ordinan Darurat (Kuasa-Kuasa Perlu) (No 22 tahun 1970).

Fourth charge

Bahawa kamu pada 27 Ogos 1997, di Kediaman Rasmi Timbalan Perdana Menteri No 47, Jalan Damansara, di dalam Wilayah Persekutuan Kuala Lumpur, semasa menjadi seorang anggota pentadbiran, iaitu, menjawat jawatan Timbalan Perdana Menteri dan Menteri Kewangan telah melakukan perbuatan rasuah di mana kamu telah:

mengarahkan Dato' Mohd Said bin Awang, Pengarah Cawangan Khas dan Amir bin Junus, Timbalan Pengarah Cawangan Khas II Polis Di-Raja Malaysia, menggesa Ummi Hafilda bte Ali supaya memberi kenyataan umum bertulis bagi menafikan salah laku seks dan liwat yang dilakukan oleh kamu dengan tujuan melindungi diri kamu daripada sebarang tindakan atau prosiding bersifat jenayah dan akibatnya Ummi Hafilda bte Ali telah memberikan kenyataan umum bertulis bertarikh 29 Ogos 1997 seperti mana yang diarahkan,

dan oleh yang demikian kamu telah melakukan satu kesalahan yang boleh dihukum di bawah s 2(1) Ordinan Darurat (Kuasa-Kuasa Perlu) (No 22 tahun 1970).

Fifth charge

Bahawa kamu, pada 3 Disember 1992, antara 4.50 petang dan 5.50 petang, di bilik No 758 di Hotel PJ Hilton, Petaling Jaya, dalam Negeri Selangor Darul Ehsan telah dengan sengaja melakukan persetubuhan dengan bertentangan dengan aturan tabii dengan Mior Abdul Razak bin Yahya dengan memasukkan zakar kamu ke dalam duburnya dan oleh yang demikian kamu telah melakukan satu kesalahan yang boleh dihukum di bawah s 377B Kanun Keseksaan.

Sixth charge

Bahawa kamu pada 24 Mei 1995, lebih kurang jam 5.30 petang, di Pejabat Menteri Kewangan, di Kementerian Kewangan Jalan Duta, Kuala Lumpur di dalam Wilayah Persekutuan, semasa menjadi seorang anggota pentadbiran, iaitu, menjawat jawatan Timbalan Perdana Menteri dan Menteri Kewangan, telah melakukan perbuatan rasuah berkaitan dengan siasatan Badan Pencegah Rasuah ke atas Setiausaha Sulit kamu, En Mohd Azmin bin Ali, yang disyaki menerima rasuah sehingga dia telah mengumpulkan harta yang tidak munasabah berbanding dengan pendapatannya, iaitu kamu telah:

(a) campur tangan dalam siasatan tersebut; dan

(b) mempengaruhi Dato' Shafee bin Yahya, Ketua Pengarah Badan Pencegah Rasuah untuk menutup siasatan kes tersebut, bertentangan dengan prosedur siasatan Badan Pencegah Rasuah tanpa merujuk kepada Pendakwa Raya;

dan dengan perbuatan kamu itu, En Mohd Azmin bin Ali telah dilindungi daripada tindakan atau prosiding yang bersifat jenayah dan oleh yang

demikian kamu telah melakukan satu kesalahan yang boleh dihukum di bawah s 2(1) Ordinan Darurat (Kuasa-Kuasa Perlu) No 22 1970.

Seventh charge

Bahawa kamu, pada satu malam dalam bulan April 1994 di No 8, Jalan Setia Murni 1, Bukit Damansara, dalam Wilayah Persekutuan Kuala Lumpur telah dengan sengaja melakukan persetubuhan yang bertentangan dengan aturan tabii dengan Hairany bin Mohd Naffis, dengan memasukkan zakar kamu ke dalam duburnya dan oleh yang demikian kamu telah melakukan satu kesalahan yang boleh dihukum di bawah s 377B Kanun Keseksaan.

Eighth charge

Bahawa kamu, pada satu malam dalam bulan April 1998, di Kediaman Rasmi Timbalan Perdana Menteri di No 47, Jalan Damansara, dalam Wilayah Persekutuan Kuala Lumpur, telah dengan sengaja melakukan pesetubuhan dengan bertentangan dengan aturan tabii dengan Sukma Darmawan Sasmitaat Madja dengan memasukkan zakar kamu ke dalam duburnya dan oleh yang demikian kamu telah melakukan satu kesalahan yang boleh dihukum di bawah s 377B Kanun Keseksaan.

Ninth charge

Bahawa kamu, pada satu malam dalam bulan Mei 1994 lebih kurang jam 7.45, di Unit No 10–7–2, Tivoli Villa, Jalan Medang Tanduk, Bangsar dalam Wilayah Persekutuan Kuala Lumpur, telah dengan sengaja melakukan persetubuhan yang bertentangan dengan aturan tabii dengan Azizan bin Abu Bakar dengan memasukkan zakar kamu ke dalam duburnya dan oleh yang demikian kamu telah melakukan satu kesalahan yang boleh dihukum di bawah s 377B Kanun Keseksaan.

Tenth charge

Bahawa kamu, pada satu malam dalam bulan Mac 1993 di No 8, Jalan Setia Murni 1, Bukit Damansara, dalam Wilayah Persekutuan Kuala Lumpur, telah dengan sengaja melakukan persetubuhan yang bertentangan dengan aturan tabii dengan Munawar Ahmad Aness dengan memasukkan zakar kamu ke dalam duburnya dan oleh yang demikian kamu telah melakukan satu kesalahan yang boleh dihukum di bawah s 377B Kanun Keseksaan.

The accused claimed trial to all the charges. The prosecution applied for the first four charges to be tried together in accordance with s 165 of the Criminal Procedure Code ('the CPC'). The defence did not object. I allowed the application.

In the course of the proceedings, the defence made an oral application for the accused to be released on bail in respect of all the ten charges. The defence argument in support of the application was led by Mr Christopher Fernando ('the learned counsel'), while the reply by the prosecution was addressed by Dato' Abdul Gani Patail ('the learned deputy'). The grounds advanced by the defence in support of its application and the reply by the prosecution can be classified under the following headings:

Detention of the accused under the Internal Security Act 1960 ('the ISA') is no bar to bail

Learned counsel said that his application may be countered by the argument that bail must not be allowed as the accused has been detained under the ISA. He said that both the matters must be treated as separate and distinct issues. He added that if bail is not granted, the accused may find himself in an anomalous situation if no detention order is made against him at the end of the 60-day period. In his reply, the learned deputy said that as the accused has been detained under the ISA, any bail granted would be an exercise in futility as he would still not be released by virtue of the continuance of his detention. He added that the prosecution undertakes to inform the court and the defence the moment the accused is released so that an application for bail could be made promptly.

Social status of the accused

Learned counsel said that until three weeks ago, the accused was the Deputy Prime Minister of Malaysia. He had held high public office for the last 16 years. There was also one occasion when he acted as the Prime Minister for a period of two months. He is a respectable person not only in Malaysia but is also held in high esteem internationally and has a clean record.

Health condition of the accused

Learned counsel said that the accused is in poor health and requires constant medical attention and produced a letter from the University Hospital describing the accused's medical condition. The report says that the accused is suffering from reflux oesophagitis. Learned counsel added that this is a chronic condition and requires medicine and meals at regular times. He added that the accused cannot be put to physical stress as this could invite serious complications to his pre-existing conditions. He said that the conditions while in custody cannot measure up to these requirements. In his reply, the learned deputy said that the medical report refers to the examination of a pre-existing condition in 1990 and 1995. He added that doctors are allowed to see the accused and that he has been observed for 24 hours.

Danger of absconding

It was the defence contention that the accused has his roots in Malaysia and there is no danger of him absconding or leaving the jurisdiction.

Danger of witnesses being tampered with

Learned counsel said that the accused will in no way obstruct the prosecution. The alleged victims in respect of the four charges are senior police officers and the Director General of the Anti-Corruption Agency.

He said that it is unthinkable that the accused, who is now facing these charges will have any opportunity to exert any influence on or tamper with them bearing in mind the massive security arrangements that have been mounted. He said that there is no likelihood of the accused setting up false evidence in support of his defence. The learned deputy said that there is no guarantee that if the accused is released on bail, he will not obstruct the prosecution in any way. He said that there is a real danger of witnesses being tampered with. He said that seven witnesses have lodged police reports saying that they have been tampered with. These persons are material witnesses for the prosecution and two of them are relevant witnesses for the first to the fourth charges. He added that the accused is likely to set up false evidence in support of his defence and a police report has been made on this issue. He said that the first to the fourth charges themselves relate to preparation of false documents. In his reply, learned counsel said that the police reports referred to by the prosecution are not against the accused.

Opportunity for the accused to prepare his defence

Learned counsel said that the release of the accused on bail would facilitate the preparation of his defence. It will be difficult to take instructions from the accused if he is in detention.

Long period of detention

Learned counsel said that ten charges of a serious nature have been preferred against the accused. There is a strong likelihood that these cases would stretch over a long period of time before they are concluded. He said that it is not in the best interests of anyone to allow the accused to languish in detention pending the disposal of these cases. The learned deputy said that the question of the accused languishing in prison does not arise as early dates have been fixed for the hearing of the cases.

Bail with conditions

Learned counsel concluded by saying that if the court is minded to grant bail, the accused is prepared to have conditions attached to the bail and that if he breaches the conditions the bail may be revoked.

Before embarking on a consideration of the merits of the application, it is first necessary to advert to the law relating to bail. This area of the law is governed by ss 387, 388 and 389 of the CPC. Section 387 of the CPC deals with bailable offences. Where a person is charged with a bailable offence, he is entitled to be released on bail as of right (see *PP v Dato' Mat* [1991] 2 MLJ 186; *Sebastian v PP* [1968] 2 MLJ 214; *R v Lim Kwang Seng & Ors* [1956] MLJ 178; *Bakshi Sardari Lal v Supt, Tehar Central Jail* [1968] Cr LJ 675; *Ratilall Bhanji Mithani v Assistant Collector of Customs* AIR 1967 SC 1939). Section 388 of the CPC deals with non-bailable offences. In the case of such offences, bail is at the discretion of the court (see *Lim Kiap Khee v PP* [1988] 1 MLJ 198). Section 389 of the CPC

empowers the High Court to, inter alia, direct that any person be admitted to bail. This power is also exercisable at the discretion of the court (see *PP v Zulkifflee bin Hassan* [1990] 2 MLJ 215). The discretion to grant or not to grant bail must, however, be exercised judicially (see *Re KS Menon* [1946] MLJ 49). As Das J observed in *Sagri Bhagat & Ors v State of Bihar* AIR 1951 at p 497, the difficulty in laying down a formula of universal application in exercising this discretion is that the consideration will vary from case to case and it cannot be confined within the framework of a cut and dry formula. In *PP v Wee Swee Siang* [1948] MLJ 114, Callow J set out the following factors which the court may take into consideration when granting or refusing bail:

(1) whether there was or was not reasonable ground for believing the accused guilty of the offence;

(2) the nature and gravity of the offence charged;

(3) the severity and degree of punishment that might follow;

(4) the danger of the accused absconding if released on bail;

(5) his character, means and standing;

(6) the danger of the offence being continued or repeated;

(7) the danger of the witnesses being tampered with;

(8) opportunity to the accused to prepare the defence; and

(9) the long period of detention of the accused and probability of further period of delay.

The list is not exhaustive (see *Che Su bte Daud v PP* [1978] 2 MLJ 162). Thus in *Yusof bin Mohamed v PP* [1995] 3 MLJ 66, Abdul Malik Ishak J added the larger interest of the public and the country as a whole to the list of factors to be considered in making a decision on an application for bail (see also *State v Jaspal Singh Gill* AIR 1984 SC 1503). It is the net result of all the considerations for and against the accused which must ultimately decide the matter (see *Che Su bte Daud v PP* [1978] 2 MLJ 162). It must be observed that the jurisdiction must be exercised properly because it will affect the doctrine of presumption of innocence of the accused which underlies a criminal trial. However, as *Bail: Law and Practice* by MR Mallick (2nd Ed) says at p 193:

> But the fact that the accused is presumed to be innocent till the guilt is proved against him beyond all reasonable doubt is not a relevant consideration for grant of bail. Pre-trial detention in itself is not an evil, nor opposed to the basic presumption of innocence.

In support, the learned author referred to *State v P Sugathan* [1988] Cr LJ 1036 where CS Nair J said:

> In some quarters, a feeling seems to exist that the object of criminal law is to protect the rights of the accused and that the criminal justice system is envisioned as a sentinel of the rights of the accused. It is not so. The law is the sentinel of rights, of the society and of the individual. The rights of the criminal defendant will be as zealously guarded, as the cause of public justice. Pre-trial detention in itself is not an evil, nor opposed to the basic

presumption of innocence. Pronouncements of the Supreme Court have recognized the importance of effective investigation, as much as the rights of the accused.

There is no mandatory requirement in s 388 of the CPC that an application for bail must be made in writing. A court can consider the prayer for bail even if made by the accused or his counsel orally (see *Babu Singh v State of UP* [1978] Cr LJ 657; *Nabachandra Singh v Manipur Administration* AIR 1964 Mani 39).

In the light of the applicable law, it is first necessary to determine whether the offences with which the accused has been charged are bailable or non-bailable in order to decide whether he is entitled to bail as of right or at the discretion of the court. Section 2 of the CPC provides that a 'bailable offence' means an offence shown as bailable in the First Schedule to the CPC or which is made bailable by any other law for the time being in force and 'non-bailable offence' means any other offence. The offences of sodomy preferred against the accused are shown as non-bailable in the First Schedule to the CPC. Bail for these offences is therefore at the discretion of the court. With regard to the offences against the accused for corrupt practices under s 2(1) of Ordinance No 22, the First Schedule to the CPC, provides that offences against laws other than the Penal Code are not bailable if punishable with imprisonment for three years and upwards. In this case, the offences are punishable with imprisonment of 14 years and would therefore be non-bailable in accordance with the First Schedule to the CPC. However, specific provision has been made for bail under s 9(1) of Ordinance No 22 in respect of offences under it. It empowers a person accused of an offence under that ordinance to be remanded in custody or to be released on bail. I interpolate to say that there is no conflict between s 9(1) of Ordinance No 22 which empowers bail to be allowed for offences under that ordinance and the First Schedule to the CPC pursuant to which offences under s 2(1) of Ordinance No 22 are not bailable by virtue of the penalty prescribed therein. In saying this, I adopt the view expressed by Wan Yahya J (as he then was) in *Loy Chin Hei v PP* [1982] 1 MLJ 31, that where provision is made in a later legislation with regard to bail, then the later provision will prevail over the provisions of the CPC. As Ordinance No 22 provides for an option of a remand order in lieu of bail, it is my view that bail in the case of offences under the Ordinance is at the discretion of the court and is not a matter of right. In any event, the accused may be admitted to bail at the discretion of the High Court pursuant to s 389 of the CPC. In the premises, the right of the accused to bail under both the category of offences that he has been charged with is at the discretion of the court.

I shall now consider the merits of the application made by the accused against the background of the law that I have adverted to.

Detention of the accused under the ISA

I agree with the submission of learned counsel that the detention of the accused under the ISA and the bail application are separate and distinct

issues. In my view, the granting of bail to the accused in the face of his detention under the ISA is not an exercise in futility as contended by the prosecution. The accused can be released from detention under the ISA at any time by the police. In that event, he would continue to be in remand till he moves the court for bail. That may take a few days and, to my mind, is an infringement of his right to liberty. An accused person should not be kept in custody for a moment longer than is necessary (see *Sulaiman bin Kadir v PP* [1976] 2 MLJ 37). I would therefore hold that the application for bail by the accused can be considered on its merits notwithstanding the fact that he is subject to detention in respect of another matter. In so holding, I derive support from the judgment of the Nigerian Court of Appeal in *Madike v The State* [1992] LRC (Crim) 144 where Kolawole JCA said at p 148:

> The Vice-President of the country may decide tomorrow to release the applicant from detention; if bail has been refused mainly on the ground that the applicant is under detention, would she have to bring a fresh application for bail if the order of detention is revoked? My view is that the application for bail must be considered on its own merit without reference to the detention of the applicant, which detention order may be revoked before the appeal of the applicant is heard and determined.
>
> Indeed the question of bail has nothing to do with the detention order because both the detention order and the conviction of the applicant emanated from two independent authorities. Each of the authorities exercised their functions independently and under two different and unrelated laws.

I must point out that if the accused is granted bail, the bond that has been executed shall not affect his detention. This is provided by s 319(ii) of the CPC which reads as follows:

> Nothing in this section, section 387 or section 388 shall be deemed to require the release of any person liable to be detained for some matters other than that in respect of which the bond was executed.

I find further support for the view that I have expressed in the language of this subsection as it pre-supposes the right of a person to bail even though he is subject to a detention order.

Social status of the accused

There can be no dispute that the accused enjoyed an elevated status both at national and international level. It has been held that the social position or status of an accused person per se is not a sufficient ground for granting or rejecting an application for bail (see *Shaikh Karim & Ors v Emperor* AIR 1926 Nag 279; *State v Mehboob Ali Khan* AIR 1956 Bom 548). But in matters relating to grant of bail, the character, behaviour, means and standing of the accused may assume relevance along with other circumstances to consider his release on bail (see *Juglekor v Emperor* ILR 54 All 115 (FB); *Raja Narendralal Khan v Emperor* ILR 36 Cal 166). The gravity of the offence is also to be considered in granting or refusing bail, even if the social position or status of the accused is very high in society (see *Bail: Law and Practice* by *MR Mallick* (2nd Ed) p 249). Thus, this

ground can be considered in favour of the accused only if the other factors are in support of his application.

Health condition of the accused

I agree that this is an important ground to be considered in making a ruling on the application before me. However, bail on medical ground should not be granted by the court unless it is satisfied that the illness is such as would not be properly treated while the accused is under detention (see *Bail: Law and Practice* by *MR Mallick* (2nd Ed) p 189). Where proper treatment is available in the place of detention, bail cannot be granted in respect of the illness (see *Sangappa v State of Karnataka* [1984] Cr LJ 1367). Learned counsel merely said that the accused requires medicine and meals at regular intervals because of his medical condition; that he cannot be put to physical stress and that the conditions while in custody cannot measure up to these requirements. It will therefore be observed that learned counsel has only submitted on the medical requirements of the accused followed by a general statement that the condition while in custody will not measure up to these requirements. He did not place any material on record to show that the medical condition of the accused is such as would not be properly treated while in detention. Neither did he say that the accused is not receiving the required treatment. On the other hand, the prosecution said that doctors are allowed to see the accused and that he has been observed for 24 hours. This was not challenged by the defence. I therefore hold that this ground has no merits.

Danger of absconding

The submission of the defence that there is no danger of the accused absconding or leaving the jurisdiction was not countered by the prosecution. I therefore accept the contention of the defence. This is an important factor to be considered in favour of the accused. It has been held by the Indian Supreme Court that of all the factors to be considered in assessing a bail application, the most important considerations are the likelihood of the accused absconding or the danger of tampering with evidence (*Gurbaksh Singh v State of Punjab* AIR 1980 SC 1632). However, this factor must be considered in the light of the other features of the case.

Danger of witnesses being tampered with

There is an onus on the accused to show, on a balance of probabilities, that his admission to bail would not prejudice the interests of justice (see *Hussey v The State* [1992] LRC (Crim) 62). The defence merely contended that there is no possibility of the accused tampering with the witnesses for the prosecution. It must be observed that the argument of the defence on this issue was confined to the difficulty of tampering with the high ranking police officers and the Director General of the Anti-Corruption Agency referred to in the charges. This overlooks the fact that they are not the only witnesses in the ten charges in respect of the bail application. The charges

A themselves indicate that there are other witnesses of lesser standing. The defence has not addressed its mind to the vulnerability of this category of witnesses. The prosecution, on the other hand, alleged that there is a real danger of witnesses being tampered with and tendered some police reports made by potential witnesses who had been tampered with. The defence did not challenge these reports but merely said that the reports are not personally against the accused. An allegation of tampering with witnesses is a matter of serious concern in bail applications. In this regard, I refer to *PP v Wee Swee Siang* [1948] MLJ 114, where Callow J said at p 115:

> On the other hand the learned deputy public prosecutor spoke of the likelihood of interference with prosecution witnesses, and that is a strong reason. At p 969 of Sohoni's *Code of Criminal Procedure* it states:
>
> 'Any allegation that the accused is tampering or attempting to tamper with evidence would be a cogent ground for refusing bail.'

In my opinion, the fact that the reports lodged are not against the accused personally is not relevant. What is material is the fact that potential witnesses for the prosecution may be tampered with. This is supported by the reports that have been lodged. Such tampering is against the process of justice and is for the benefit of the accused. To that extent, the persons against whom the reports have been lodged acted on behalf of the accused with or without his knowledge. It has been held that where there was tampering with evidence on behalf of an accused person in a serious case, bail should not have been granted (see *Shahzad Hossain Khan v Ishtaq Hasam Khan* AIR 1987 SC 1613). It will definitely have a bearing on the outcome of the case even if the accused was not directly involved in such activities. In any event, the allegation by the prosecution that the accused is likely to set up false evidence in support of his defence and that a police report has been made on this issue was not challenged by the defence. The release of the accused on bail in these circumstances may aggravate the danger of witnesses being tampered with. This is particularly significant in the light of the seriousness of all and the nature of some of the charges preferred against the accused. The charges under s 2(1) of Ordinance No 22 themselves have a strong bearing on the allegation of tampering made by the prosecution though the truth of the charges can be determined only at the end of the trial. I must add that the fact that a person is charged with an offence may on its own be taken into consideration to reflect its gravity in an application for bail (see *R v Ooi Ah Kow* [1952] MLJ 95; *R v Chan Choon Weng & Ors* [1956] MLJ 81; *PP v Latchemy* [1967] 2 MLJ 79); *Chinnakarappan v PP* [1962] 2 MLJ 234). I am therefore satisfied that the likelihood of witnesses being tampered with is a cogent reason for the accused not to be released on bail.

Opportunity for the accused to prepare his defence

As I had made an order allowing three of the accused's counsel to have access to him at any one time for the purpose of obtaining instructions, this ground does not have any merit. As a matter of fact, I invited the defence to notify me if there was any breach in respect of the order for access that I had made.

Long period of detention

I agree with the submission of the prosecution that the question of the accused languishing in prison does not arise as early dates have been fixed for the hearing.

Bail with conditions

The submission of the defence that bail may be granted with conditions attached will only arise for consideration, if in the first place, the court is amenable to grant bail as conditions attached to bail are complementary and concomitant to the grant of bail. In saying this, I find support in the (then) Supreme Court judgment in *PP v Dato' Mat* [1991] 2 MLJ 186 where Wan Yahya J (as he then was) said at p 188:

> Such condition therefore, to our mind, is not the principal but only a complementary security to be applied concomitantly with the amount prescribed in the bail bond. Such condition in the bail bond would have a persuasive effect of reducing a larger amount of bail which would have been otherwise required by the court.
>
> The amount of money in the bail bond and not the condition form the prerequisite to the release of an arrested person on bail.

In the premises, I was satisfied that the argument advanced by the defence in support of its application was without merit. No material was placed before me to show that the accused will not get appropriate medical treatment while in detention. The early date for hearing that has been given will ensure that the accused does not languish in detention unnecessarily. I was satisfied that sufficient steps had been taken to ensure that the accused has the necessary opportunities to defend himself. The prosecution's submission that witnesses may be tampered with if the accused is released on bail has merit. This finding neutralizes the fact that the accused will not abscond if released on bail. On the authority of *PP v Mat Zain* [1948–49] MLJ Supp 142, I also took into account the gravity of the offences with which the accused has been charged. They are of a serious nature carrying stiff penalties. The charges against the accused under Ordinance No 22 strike at the very core of the administration of justice. Offences of this nature will affect the wider interests of the community at large particularly in the light of the exalted position occupied by the accused. In the circumstances, the social status of the accused does not operate in his favour as the other grounds advanced by him have no merit. Accordingly, I refused the application for bail on a consideration of all the matters before me. Thus, the question of releasing the accused on bail with conditions attached does not arise. I then ordered that the accused be remanded. In hearing the application, I guarded against forming, or the possibility of forming, any impression on the merits of the case.

Application dismissed.

Reported by Andrew Christopher Simon